IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO. 898 OF 2004

IN

EXECUTION APPLICATION NO. 335 OF 2002

Datar Switchgear Limited ..Petitioner.
v/s.
Maharashtra State Electricity Board ..Respondent.

Mr.R.Dada, sr. counsel with Ravi Kadam with C.S. Blasara with M.M.Taly i/b. S. Mohammedbhai, adv for the Petitioner.

Mr. T.R. Andhyarjunha, sr. counsel with E.P. Bhavneha with shyam Diwan with Ruby Kerawala with Kiran Gandhi i/b. Little and co. adv for the Respondent.

CORAM: S.U. KAMDAR, J.
DATE : 14TH DECEMBER, 2004.

P.C.:

1. By the present Chamber Summons, the petitioners are seeking that the order dated 29.10.2002 be recalled and or set aside. Some of the facts of the present case briefly enumerated are as under.

2. Inrespect of the differences and disputes the matter between the parties i.e. between the petitioner and the respondent herein, was referred to the Arbitration Tribunal of three arbitrators. The tribunal by their Award dated 10.5.2001 has granted the claim of Rs.76,65,049/- alongwith interest thereof. It is not disputed before me that their claim in the said Award is for Rs.1.13 crores. Inrespect of other disputes which are not connected with the aforesaid award by and between the parties, a different arbitration Tribunal was constituted and the said Arbitral Tribunal was seized of the said matter at the time of passing of an order dated 29.10.2002.

3. In the course of the said arbitration proceedings, the Arbitral Tribunal had passed an interim award in the sum of Rs.6.81 crores in favour of the respondent against the petitioner. In the light of the aforesaid position when the petitioners sought to put in execution the Award decree dated 10.5.2001 for the sum of Rs.1.13 crores an objection

was raised by the respondent that the said award should not be permitted to be executed since they are also holding an interim award decree for Rs.6.81 crores whcih is much larger to the Award decree of petitioner for Rs.1.13 crores. However, since the bank account of the respondent was attached the respondent took out another application being Chamber summons No. 924 of 2002 for recalling the attachment. On the said Chamber summons an order came to be passed on 29.10.2002 which is reproduced as under :

> "1. By consent the chamber summons is placed on board and called out for hearing.
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> 2. By an interim award, about Rs.6.81 crores have been awarded in favour of the respondents. By another award the arbitrators have awarded in the claimants favour a sum of Rs.76,65,049/- lacs. Which together with interest comes to Rs.1.13 crores. It is agreed between the parties that the respondents shall given the claimant credit in

respect of the former award. This credit is subject to further orders in arbitration proceedings and in the appeal filed by the applicant being Appeal no. 1038 of 2001.

3. In view of the aforesaid order, the chamber summons is made absolute in terms of prayer clause (a).

4. This order is without prejudice to the rights and contentions of the parties."

4. The arbitration proceedings which were pending at the time and in which the interim award was passed thereof proceeded further and now the final Award has been passed by the Arbitral Tribunal. In the final award a large amount of claim has been awarded in favour of the petitionerand against the respondent. A further set-off is given to the respondent corporation inrespect of their claim under an interim award decree of Rs.6.81 crores interim award. It is an admitted

position before me that while granting the set-off the Arbitral Tribunal has not taken into consideration the claim of the petitioner under an Award decree dated 10.5.2001 for a sum of Rs.1.13 crores. Therefore in my opinion the said decree of Rs.1.13 crores is not satisfied and the same is outstanding because arbitrator has not given any adjustment in respect of the said Award while passing the final Award. However an interim award for Rs.6.81 crores stood merged in final award and the arbitrator have given set-off also for the same in final award. Then the question of setting of an award/decree dated 10.5.2001 for sum of Rs.1.13 crores can not be set-off against interim award of Rs.6.81 crores.

5. The learned counsel for the respondent corporation however contends that the present Chamber Summons for recall of earlier order dated 29.10.2002 is not maintainable. According to him the only remedy available to the petitioner is to apply to the Arbitral Tribunal who has passed the Award in their favour for modification, rectification under section

33 of the Arbitration and Conciliation Act, 1996. I am unable to accept the contention raised by the learned counsel for the petitioner. The award decree for Rs.1.13 crores is infact not the subject matter of the arbitration proceedings before the subsequent arbitral tribunal where the differences and disputes pertain to another claim. It is only because the interim award was pending at that point of time of sum of Rs.6.81 crores that the order dated 21.10.2002 was passed. Ultimately the said interim award for sum of Rs.6.81 crores is merged with the final award passed by the arbitral tribunal and in the final award it is the respondent who has to make payment to the petitioner. The question thereof of set-off of Rs.1.13 crores in a separate award decree cannot and does not arise. In my view there is subsequent change of circumstances and therefore the present application is maintainable. These change of circumstances have taken away the base of the earlier order dated 29.10.2002 and thus it is necessary to recall the said order.

6. In view of the aforesaid circumstances, the present Chamber Summons is made absolute in terms of prayer clause (a). The petitioner is at liberty to execute a final decree of Rs.1.13 crores. However, there shall be no order as to costs.

SD/-

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